IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 443 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ARUNKUMAR KANJIBHAI SHAH

Versus

DWARKADAS KANJIBHAI SHAH

Appearance:

1. Civil Revision Application No. 443 of 2001

MR AMAR D MITHANI for Petitioner No. 1

NOTICE SERVED for Respondent No. 1-2,4

..... for Respondent No. 3

MR KB PANERI for Respondent No. 5

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 11/07/2002

ORAL JUDGEMENT

This is a revision application under section 115 of the Code of Civil Procedure, 1908, challenging an order of the Executing Court being Court of Learned Civil Judge (SD), Veraval, Junagadh District on 28.1.2002 in Execution Petition No.12/98 under which the learned Judge

dismissed the said Execution Petition of the present petitioner. The present petitioner appears to have obtained preliminary decree for partition by filing Civil Suit No.35/85 before the 4th Joint Civil Judge (SD), Junagadh. The said decree was passed by the said Court on 1.1.1988. In accordance with the said preliminary decree, the Commissioner was appointed for the partition of the property by metes and bounds, It appears that the Commissioner submitted a report at Mark 49/1 stating that it was not possible to partition the property by metes and bounds. Therefore, it was necessary to dispose of the said property by public auction. It appears that during the course of the said proceedings, the said application was submitted by the petitioner for issuing proclamation for public auction of the said property on 17.1.1999. The said aplication Exh.14 was heard by the learned trial Judge and it was dismissed by him on following consideration:

(i) There is difference in the case of the decree holder. At one stage, it has been said that the decree holder has been granted 1/5th share and at another stage, the decree holder has said that he has been granted 1/4th share.

(ii) It has not been mentioned as to whether the appeals have been filed against such judgment and decree of the said court.

(iii) If there are two different decrees then, the decree could not be amended by the Executing Court.

2. On aforesaid three considerations, the learned Judge of the Executing Court, dismissed the said application of the petitioner for putting the said property in public auction.

3. The petitioner-original plaintiff and decree holder, felt aggrieved by the judgment and order of the trial court, he has filed this revision. It has been contended here that the order passed by the Executing Court is illegal and it is required to be interfered with. At the first instance, Rule was issued and it was duly served. It appears that Mr K B Paneri, learned Advocate appears for respondent no.5 but he was not present on earlier occasions and he was not present today also. Therefore, I have heard the learned Advocate for the petitioner and perused the papers. Other respondents have not been appearing despite service of rule.

4. Learned Advocate for the petitioner has contended that he aforesaid three grounds on which the application of the petitioner was turned down, are not the grounds appearing on record of the case. It is his case that though the decree was originally passed in favour of the petitioners, holding that 1/5th share is granted to the petitioners, the decree was subsequently amended since the mother of the petitioner had passed away and, therefore, the petitioner has become entitled to 1/4th share. That there was no discrepancy in mentioning the share of the petitioner. This aspect of the argument has not been controverted and, therefore, there is no reason to reject the said contention. It has also been argued by the learned Advocate for the petitioner that the petitioner has positively stated in the execution petition that no appeal was preferred against the judgment and decree passed in Special Civil Suit No.176/89. Even here also he sticks to his statement that no appeal is preferred. It is very clear that the suit was decreed as back as in 1988 and if the appeal had been preferred then the trial court could have been informed by the appellate court about filing of appeal. It seems that no communication has been received by the Civil Court or by the Executing Court and, therefore, in view of the aforesaid statement made by the learned Advocate for the petitioner, it has to be accepted that no appeal has been preferred. It has been mentioned in the execution proceedings that appeal has not been preferred and no communication has been received about the filing of appeal by the Executing Court and the learned Advocate for the petitioner makes a statement here also that no such appeal has been preferred. In that view of the matter, even this ground was not available to the Executing Court for turning down the aforesaid prayer of the petitioner. Then, so far as the change in the decree is concerned, the change in the decree was not sought at the hands of the Executing Court. The decree is said to have been amended by the original court. Therefore, even the third ground on which the application has been turned down was not there before the trial court. In that view of the matter, the order passed by the learned Judge of the Executing Court turning down Exh.14 of the petitioner is ex-facie illegal. It means that he has failed to exercise jurisdiction vested in him. As a Judge of the Executing Court, he was required to pass appropriate orders for putting the said property for public auction, when the learned Commissioner had reported that the partition by metes and bounds was not possible. To that extent, the order passed by the learned Judge of the Executing Court is illegal and deserves to be interfered with in this

revision.

5. For the foregoing reasons, this revision application is allowed. The order passed by the learned Judge of the executing Court on 28.2.2001 in Special Execution Petition No.12/98 is set aside. Same way, the similar order passed below application Exh.1 in execution petition No.12/98 is also set aside. The trial court shall pass necessary orders for issuing proclamation for sale of the property in question and shall proceed further with the execution petition in accoardance with law. While so doing, the trial court shall consider that the suit was filed in 1985 and the preliminary decree was passed in 1988 and, therefore, regards are required to be paid to the age of the suit and the decree. Looking to the age of the decree in question, the trial court shall expedite the proceedings and shall dispose of the same as early as possible preferably within six months. In the meantime, the respondent shall not transfer the title or possession of the suit property and shall not create any interest of the third party therein for a period of one month from today.

Rule is made absolute. No order as to costs.

11.7.2002 [D P Buch, J.]
msp